NORIHAN TALIB & ORS v. MOHD NASIR HASSAN & ORS AND ANOTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
MARY LIM JCA
SURAYA OTHMAN J
[CIVIL APPEALS NO: T-02-(IM)(NCVC)-1053-06-2016 &
T-02-(IM)(NCVC)-1489-08-2016]
23 AUGUST 2017

CIVIL PROCEDURE: *Setting aside – Statement of claim – Recovery of monies paid in investment scheme – Application to set aside action – Whether investment scheme illegal – Whether scheme contravened Financial Services Act 2013 and Direct Selling Act 1993 – Whether claim disclosed reasonable cause of action – High Court's order granting application for Mareva injunction – Whether claim should be allowed since court already granted Mareva injunction after finding that there was good arguable case – Whether claim founded on illegal and unlawful scheme could be enforced*

The respondents ('plaintiffs') sued the appellants ('defendants') on behalf of themselves and 420 others. The whole basis of the plaintiffs' claim was that they were all agents and representatives of the defendants by virtue of an insurance investment scheme set up by the defendants around the year 2009. The scheme, known as 'Perniagaan Perkongsian Keuntungan', gave investors or those who bought insurance cover from the agents or representatives part of the commissions received by insurance agents; hence the idea of 'commercialising commission'. The amount received was dependent on the amount invested and all these investments were calculated over a 30-month period from the date of investment. At the end of that period, the whole investment amount would be returned. However, the defendants stopped paying the plaintiffs their commissions, regardless whether the 30-month period had expired or not. Despite various efforts taken, the plaintiffs were not able to recover their investments and payments from the defendants. The plaintiffs argued that the defendants' businesses and business models were actually unlicensed deposits taking or direct selling. Since these activities contravened the Financial Services Act 2013 and the Direct Selling Act 1993 ('the Acts'), these businesses and activities were said to be illegal. Thus, the plaintiffs commenced an action against the defendants in the High Court seeking to recover all their investments totalling RM34,449,844.24. The plaintiff also sought for, and was granted, a *Mareva* injunction. The defendant, on the other hand, filed an application to strike out the plaintiff's action claim under O. 18 r. 19(1)(a) of the Rules of Court 2012 contending that the plaintiff's pleaded case disclosed no reasonable cause of action against the defendants. The defendants further contended that since the plaintiffs' claim was founded on illegal and unlawful scheme which violated the Acts, the aid of the court was not available to the plaintiffs in as much as it was also not

available to the defendants. The plaintiffs opposed the defendants' application arguing that since the court had already granted the *Mareva* injunction after finding that there was a good and arguable case, the court should not revisit and re-determine the issues presented by the defendants. The plaintiffs also argued that their claim in court was not to enforce the illegal agreements, whether by way of a specific decree or an order to recover the sums contractually promised to the plaintiffs under the agreements. Instead, the plaintiffs sought special, general, exemplary and aggravated damages, accounts, interest on the judgment sum and costs. Two appeals were filed herein, namely, against the orders of the High Court in granting the *Mareva* injunction and dismissing of the defendants' application to strike out the plaintiffs' claim against the defendants.

Held (allowing appeals with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) Although the plaintiffs were not suing the defendants for restitution, enforcement of agreements, specific performance or to recover monies promised to them under the agreements, the plaintiffs were nevertheless seeking the assistance of the court on an action that was rooted in illegality. The law is trite in that the court could not grant any relief on a claim which was founded on illegality, let alone enforce any rights based on such illegality. (para 26)

(2) The proper consideration of the matter of illegality which was central in these appeals must start with the plaintiffs' claim, as pleaded. The plaintiffs sought to recover their investments of RM34,449,844.24 which they had paid under the schemes and under their agreements. These schemes, arranged under the agreements which the plaintiffs had signed with the defendants, were pleaded by the plaintiffs themselves to be invalid and unenforceable. (para 27)

(3) The plaintiffs pleaded that the defendants' businesses and business models were illegal because the Acts had been contravened. Although the plaintiffs have sought to distance themselves from their pleas, by submitting that the plaintiffs were not in court to seek enforcement of the agreements, or to seek a decree of specific performance of the agreements, or even less, to seek recovery of the sums contractually promised to the plaintiffs under the agreements, the plaintiffs were actually seeking to recover their investments due to the illegal agreements. Having made those complaints, it did not lie in the face of the plaintiffs to say that their claim nevertheless was sustainable because they were seeking some other remedy. These remedies were restitutionary in nature, where the plaintiffs were seeking to be restored to their pre-contractual positions. (paras 28 & 29)

(4) The plaintiffs were *in pari delicto* in these illegal schemes. It would be against public interest to permit such recourse. Such a claim was therefore obviously unsustainable in law and would not succeed. (para 39)

(5) An application to strike out pleadings relies on different principles from those engaged in an application for an interim injunction. Just because an injunction is allowed does not mean that the application to strike out must necessarily fail. The failure of the High Court to consider and deliberate according to the applicable principles was enough to invite the intervention of this court. (para 42)

Bahasa Malaysia *Headnotes*

Responden-responden ('plaintif-plaintif') telah memulakan tindakan terhadap perayu-perayu ('defendan-defendan') bagi pihak mereka sendiri dan 420 orang lain. Dasar tuntutan plaintif-plaintif adalah bahawa kesemua mereka adalah ejen dan wakil defendan-defendan berdasarkan skim pelaburan insurans yang ditubuhkan oleh defendan-defendan sekitar 2009. Skim ini, yang dikenali sebagai 'Perniagaan Perkongsian Keuntungan', memberi pelabur atau orang-orang yang membeli perlindungan insurans daripada ejen atau wakil sebahagian komisen yang diterima oleh ejen insurans; oleh itu idea 'mengkomersialkan komisen'. Amaun yang diterima bergantung pada amaun yang dilaburkan dan kesemua pelaburan ini dikira dalam tempoh 30 bulan dari tarikh pelaburan. Pada akhir tempoh itu, jumlah keseluruhan pelaburan akan dikembalikan. Walau bagaimanapun, defendan-defendan berhenti membayar plaintif-plaintif komisen mereka, tidak kira sama ada tempoh 30 bulan telah tamat atau tidak. Walaupun pelbagai usaha diambil, plaintif-plaintif tidak menerima kembali pelaburan dan pembayaran daripada defendan-defendan. Plaintif-plaintif menghujahkan bahawa perniagaan dan model perniagaan defendan-defendan sebenarnya adalah pengambilan deposit atau jualan langsung yang tidak berlesen. Oleh kerana aktiviti-aktiviti ini melanggar Akta Perkhidmatan Kewangan 2013 dan Akta Jualan Langsung 1993 ('Akta-Akta'), perniagaan dan aktiviti ini dikatakan haram. Oleh itu, plaintif-plaintif memulakan tindakan terhadap defendan-defendan di Mahkamah Tinggi untuk mendapatkan semula kesemua pelaburan mereka yang berjumlah RM34,449,844.24. Plaintif-plaintif juga memohon dan diberi injunksi *Mareva*. Sebaliknya, defendan-defendan memfailkan permohonan membatalkan tuntutan plaintif-plaintif di bawah A. 18 k. 19(1)(a) Kaedah-Kaedah Mahkamah 2012 atas alasan bahawa kes yang diplidkan plaintif-plaintif tidak mempunyai apa-apa kausa tindakan terhadap defendan-defendan. Defendan-defendan selanjutnya menegaskan bahawa oleh kerana tuntutan plaintif-plaintif adalah berdasarkan skim yang tidak sah dan menyalahi Akta-Akta, bantuan mahkamah tidak tersedia buat plaintif-plaintif seperti juga yang tidak tersedia buat defendan-defendan. Plaintif-

plaintif menentang permohonan defendan-defendan dengan menghujahkan bahawa oleh kerana mahkamah telah memberikan injunksi *Mareva* setelah mendapati terdapat kes yang boleh dipertikaikan, mahkamah tidak boleh meneliti semula dan menentukan semula isu-isu yang dikemukakan oleh defendan-defendan. Plaintif-plaintif juga berpendapat bahawa tuntutan mereka di mahkamah bukanlah untuk menguatkuasakan perjanjian haram, sama ada melalui perintah tertentu atau perintah untuk mendapatkan jumlah wang yang dijanjikan secara kontrak kepada plaintif-plaintif bawah perjanjian tersebut. Sebaliknya, plaintif-plaintif memohon ganti rugi khas, am, teladan dan teruk, akaun, faedah atas jumlah penghakiman dan kos. Dua rayuan difailkan di sini terhadap perintah Mahkamah Tinggi, iaitu, dalam membenarkan permohonan injunksi *Mareva* dan menolak permohonan defendan-defendan untuk membatalkan tuntutan plaintif-plaintif terhadap defendan-defendan.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Walaupun plaintif-plaintif tidak memulakan tindakan terhadap defendan-defendan untuk restitusi, penguatkuasaan perjanjian, pelaksanaan spesifik; atau untuk memulihkan wang yang dijanjikan kepada mereka bawah perjanjian, plaintif-plaintif bagaimanapun meminta bantuan mahkamah atas tindakan yang berakarkan ketaksahan. Undang-undang adalah mantap bahawa mahkamah tidak dapat memberikan sebarang relif terhadap tuntutan yang diasaskan bawah ketaksahan, apatah lagi membenarkan penguatkuasaan hak berdasarkan ketaksahan sedemikian.

(2) Pertimbangan yang betul berkenaan isu ketaksahan yang menjadi keutamaan dalam rayuan-rayuan ini harus bermula dengan tuntutan plaintif, sebagaimana yang diplidkan. Secara asasnya, tuntutan plaintif-plaintif adalah bahawa plaintif-plaintif berusaha mendapatkan semula pelaburan mereka sebanyak RM34,449,844.24 yang telah dibayar bawah skim dan perjanjian. Skim-skim ini, yang diatur bawah perjanjian yang ditandatangani oleh plaintif-plaintif dengan defendan-defendan, telah diplidkan oleh plaintif-plaintif sendiri sebagai tidak sah dan tidak dapat dikuatkuasakan.

(3) Plaintif-plaintif memplidkan bahawa perniagaan dan model perniagaan defendan-defendan menyalahi Akta-Akta telah dilanggar. Walaupun plaintif-plaintif telah berusaha untuk menjauhkan diri dari permohonan mereka, dengan menghujahkan bahawa plaintif-plaintif tidak berada di mahkamah untuk mendapatkan penguatkuasaan perjanjian, atau untuk mendapatkan pelaksanaan spesifik perjanjian, atau sekurang-kurangnya, untuk mendapatkan semula jumlah yang dijanjikan bawah kontrak, plaintif-plaintif sebenarnya berusaha mendapatkan semula pelaburan mereka dalam perjanjian tidak sah. Setelah membuat aduan-aduan

tersebut, adalah tidak patut untuk plaintif-plaintif mengatakan bahawa tuntutan mereka tetap mampan kerana mereka memohon remedi yang lain. Remedi-remedi ini adalah bersifat restitusi, iaitu plaintif-plaintif cuba dikembalikan ke kedudukan mereka pra-kontrak.

(4) Plaintif-plaintif berada dalam *pari delicto* dalam skim yang tidak sah ini. Adalah bertentangan dengan kepentingan awam untuk memberi remedi yang dipohon plaintif-plaintif. Oleh itu, tuntutan sedemikian jelas tidak dapat dipertahankan bawah undang-undang dan tidak akan berjaya.

(5) Satu permohonan untuk mengetepikan pliding bergantung pada prinsip-prinsip berbeza daripada yang terkandung dalam satu permohonan untuk injunksi interim. Oleh kerana permohonan injunksi telah dibenarkan tidak bermakna bahawa permohonan untuk pengetepian harus gagal. Kegagalan Mahkamah Tinggi mempertimbangkan dan memutuskan berdasarkan prinsip-prinsip adalah cukup untuk mengundang campur tangan mahkamah ini.

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Derby & Co Ltd & Ors v. Weldon & Ors [1990] Ch 48 ***(refd)***

Dynacast (Melaka) Sdn Bhd & Ors v. Vision Cast & Anor [2008] 10 CLJ 190 HC ***(refd)***

Flannery and Another v. Halifax Estate Agencies Ltd [2000] 1 All ER 373 ***(refd)***

Foo Jong Wee & Ors v. Hj Afifi Hj Hassan [2016] 6 CLJ 696 CA ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA ***(refd)***

Letang v. Cooper [1965] 1 QB 222 ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

Patel v. Mirza [2016] UKSC 42 ***(refd)***

Pharmmalaysia Bhd v. Dinesh Kumar Jashbhai Nagjibha Patel & Ors [2004] 7 CLJ 465 HC ***(refd)***

S&F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228 FC ***(refd)***

Setiausaha Kerajaan Negeri Selangor v. Perbadanan Riadah Sdn Bhd And Another Appeal [2016] 1 LNS 1497 CA ***(refd)***

Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a Firm) [2009] UKHL 39 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19(1)(a)

For the appellants - Gopal Sri Ram, Stanley Isaacs, Shara Isaacs, Jeremy Khalif Lee, Olivia Lee & David Yii; M/s Nadzarin Kuok Puthucheary & Tan

For the respondents - Mohamad Shahrul Fazli & Mohd Shahril Madisa; M/s Syahrul & Hamidi

[Editor's note: Appeal from High Court, Kuala Terengganu; Civil Suit No: TA-22NCVC-23-06-2015 (overruled).]

Reported by Sandra Gabriel

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JUDGMENT

Mary Lim JCA:

Introduction

[1] These two appeals involve the same parties and arise out of the same case in the court below. In both appeals, the same appellants are dissatisfied with two decisions made by the same learned judge. The first appeal, Civil Appeal No: T-02(NCVC)-1053-06-2016 concerns the grant of a *Mareva* order on 2 May 2016 whereas the second appeal, Civil Appeal No: T-02(NCVC)-1053-06-2016, concerns a dismissal of the appellants' application to strike out the respondents' claim against the appellants. After hearing learned counsel and upon careful consideration of the records of appeal, we allowed both appeals. These are our reasons in respect of both appeals.

Background

[2] It is important to understand the factual and legal basis upon which the respondents have brought their action against the appellants before us. That factual basis is apparent from the quite extensive and comprehensive statement of claim filed, and it is that basis which drew our greatest concerns and caused us to disagree with the decisions of the High Court.

[3] For ease of reference, we shall refer to the parties as they were in the court below.

[4] The four plaintiffs, sued the 14 defendants on behalf of themselves and 420 others; the details of all the plaintiffs are to be seen at appendix A. It is a representative action. The first and second defendants are husband and wife while the third and fourth defendants are brothers of the second defendant. These defendants together with the fifth to the ninth defendants are all sued in their personal and trading capacities; the latter of different companies, namely Tanjung Trading, Gandingan Wawasan Trading, Imza Berkat Enterprise and Rejab Trading. The tenth defendant is an advocate and solicitor while the remaining defendants are companies involved in the provision of consultancy, resources, agency and various other services. It is the allegation of the plaintiffs that the first ten defendants used the 11th, 12th, 13th and 14th defendants as vehicles to facilitate their fraud, conspiracy to defraud, cheating as well as misappropriation of the plaintiffs' funds for their own interests.

[5] The whole basis of the 424 plaintiffs' claim is that they were all agents and representatives of the defendants by virtue of certain insurance investment schemes set up by the defendants around the year 2009. These schemes, known as "perniagaan perkongsian keuntungan" gave investors or those who bought insurance cover from the agents or representatives part of the commissions received by insurance agents; hence the idea of "commercialising commission". The amount received was dependent on the

amount invested and thereby referred to as the first, second or third business sharing modules, offered different monthly returns to the plaintiffs. If the investment was for a sum less than RM100,000, a 4% monthly return or commission was promised while if the investment was for more than RM100,000, then a 5% monthly return was promised. All these investments were calculated over a 30-month period from the date of investment. At the end of that period, the whole investment amount will be returned. This is apparent from paras. 24 to 35 of the statement of claim.

[6] At para. 38, the plaintiffs pleaded that all or almost all the plaintiffs signed agreements of appointment with the defendants. In these agreements, the plaintiffs were appointed as services sales *(perunding jualan)*, or representatives of the defendants. The essential terms of their appointments appear at para. 39, amongst which are references to their various remuneration and obligations of confidentiality and restrictions on dealings with other investors or third parties. It is the plaintiffs' case that following their appointments, the plaintiffs either invested in the schemes themselves and/or participated in the schemes by marketing and promoting the three different business sharing modules referred to earlier, through the concept of direct selling to other members of the public.

[7] In June 2013, the defendants stopped paying the plaintiffs their commissions, regardless whether the 30-month period had expired or not – see para. 45 of the statement of claim. Despite various efforts taken either individually or together with others, the plaintiffs were not able to recover their investments and payments from the defendants. And, so, the plaintiffs decided to band together and consolidate their efforts of recovery from the defendants. A committee was formed. One of the actions taken by that committee is to file the present civil action alleging that the defendants had committed fraud, had conspired to cheat, deceive and defraud the plaintiffs, and that the defendants had misappropriated monies that the plaintiffs had paid to the defendants.

[8] At para. 65 of the statement of claim is the stark plea that the activities and businesses of the defendants which are complained of and which form the basis for this civil action, are unlicensed, and are illegal. In fact, prior to the filing of the civil action, the plaintiffs had complained on the defendants' activities to Bank Negara. Bank Negara is said to have blacklisted the defendants together with Syarikat Tanjung Trading, Syarikat Rejab Trading and Gandingan Wawasan Trading for want of a valid licence.

[9] The plaintiffs further specifically plead at paras. 65.1 to 65.3 of the statement of claim on how and why it is alleged that the defendants' businesses and business models are illegal. The plaintiffs allege that the defendants' businesses and business models are actually unlicensed deposits taking or direct selling. Since these activities contravened the law, that is, the

Financial Services Act 2013 and the Direct Selling Act 1993, these businesses and activities are said to be illegal. Consequently, the plaintiffs seek recovery of all their investments totalling RM34,449,844.24, as detailed at paras. 66 and 67 of the statement of claim.

Applications For *Mareva* Injunction & To Strike Out The Claim

[10] Two separate applications were initiated by the respective parties.

[11] The first application (encl. 4), was filed by the plaintiffs on 14 June 2015. In that application, the plaintiffs sought orders restraining all 14 defendants from *inter alia* removing their assets out of the jurisdiction of the court, or disposing or dealing with their assets, pending the disposal of the respondents' claim. Relying on various case authorities such as *Derby & Co Ltd & Ors v. Weldon & Ors* [1990] Ch 48, *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Say Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461, *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293, and *Dynacast (Melaka) Sdn Bhd & Ors v. Vision Cast & Anor* [2008] 10 CLJ 190, the plaintiffs argued that they had a good arguable case against the defendants, that the defendants had assets within the jurisdiction of the court and, that there was a real risk of dissipation by the defendants that will thwart any judgment obtained in the plaintiffs' favour unless the defendants were so restrained.

[12] The defendants opposed the application contending that the agreements which formed the basis of the plaintiffs' claim were invalid and unenforceable. Specific paragraphs of the statement of claim were pointed out to the learned judge to support the contention, namely paras. 7 to 20, 24 to 35, 36 to 43 and 65. According to the defendants, the plaintiffs were in effect, seeking to enforce and to avoid 'skim cepat kaya'. Such schemes contravened public policy and several legislations such as the Financial Services Act 2013 and the Direct Selling Act 1993 were cited in support. These were the same laws identified by the plaintiffs.

[13] Relying on and for the same reasons, the 1st - 7th, 11th, 13th and 14th defendants filed the second application (encl. 73). The tenth defendant filed a separate application, also to strike out the claim against him - see encl. 52, but it is not the subject of the present appeals.

[14] In the application found at encl. 73, the defendants sought to strike out the plaintiffs' claim under O. 18 r. 19(1)(a) of the Rules of Court 2012 contending that the pleaded case discloses no reasonable cause of action. These defendants contended that since the plaintiffs' claim was founded on illegal and unlawful schemes which violated the Financial Services Act 2013 and the Direct Selling Act 1993, the aid of the court was not available to the plaintiffs inasmuch as it was also not available to the defendants.

[15] The plaintiffs opposed the defendants' application arguing that since the court had already granted the *Mareva* injunction after finding that there is a good arguable case, the court should not revisit and re-determine the issues presented by the defendants. It was suggested that viewed against that backdrop, the defendants' application was in fact, an abuse of process and ought to be dismissed.

[16] The plaintiffs also argued that their claim in court was not to enforce the illegal agreements, whether by way of a specific decree or an order to recover the sums contractually promised to the plaintiffs under the agreements. Instead, the plaintiffs were before the court seeking special damages, general damages, exemplary and aggravated damages, accounts, interest on the judgment sum and costs.

Decision Of The High Court

[17] The learned judge agreed with the plaintiffs in respect of the application for a *Mareva* injunction. In his grounds of decision, the learned judge explained that since the plaintiffs' claim was essentially grounded in fraud, deceit, conspiracy to defraud or cheat, and misappropriation of the plaintiffs' monies, these claims must be tried. The learned judge further found that the defendants had assets within the jurisdiction of the court and that there was a real risk of dissipation of those assets or that any eventual award by the court in the plaintiffs' favour could not be enforced. The interlocutory injunction was consequently granted.

[18] As for the defendants' striking out application in encl. 73, the learned judge also accepted the submissions of the plaintiffs. Both the defendants' application and that filed by the tenth defendant were dismissed. The learned judge wrote one judgment for both applications setting out his reasons for the dismissal as follows:

(i) the fact that the High Court had already granted the *Mareva* injunction after finding that there were issues to be tried between the parties;

(ii) citing *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285, "the expression "reasonable cause of action" means "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person": per Diplock LJ in *Letang v. Cooper* [1965] 1 QB 222 at 242". Thus, the High Court was not prepared to say that the cause of action is obviously unsustainable.

(iii) relying on *Pharmmalaysia Bhd v. Dinesh Kumar Jashbhai Nagjibha Patel & Ors* [2004] 7 CLJ 465, the tenth defendant could not claim innocence and lack of culpability. As an advocate and solicitor of 20 years standing, the tenth defendant ought to have known that the schemes were invalid and that he should not have received the monies for the defendants or

allow his clients' accounts to be used as a conduit for payment to the defendants; and that the tenth defendant had wrongfully assisted in the execution of the unlawful schemes;

(iv) the plaintiffs' action was not scandalous, frivolous or vexatious nor was it an abuse of court process;

(v) this was not a plain and obvious case to strike out.

[19] The 1st - 7th, 11th, 13th and 14th defendants appealed against both decisions.

Our Decision

[20] We shall start with our deliberations on the defendants' application to strike out the plaintiffs' claim under O. 18 r. 19(1)(a) of the Rules of Court 2012. If we agree with the defendants' submissions and we allow this appeal, the second appeal on the order of *Mareva* injunction will be rendered academic and redundant.

[21] In an application to strike out under O. 18 r. 19(1)(a) of the Rules of Court 2012, no affidavit is filed to support or allude to any extraneous facts or evidence which is not already before the court; and that would be the plaintiffs' statement of claim. The application is determined by considering the statement of claim alone and, no other. When considering the application to strike out under the r. 19(1), the allegations in the statement of claim are also assumed to be true. The plaintiffs' case is, therefore, pitched at its highest. Further, an application to strike out a claim will be allowed where it is successfully shown that it is a plain and obviously unsustainable case to proceed to trial; where such a trial will yield no other answers or concerns other than what is patently already before the court at this interlocutory stage of the proceedings.

[22] Thus, when considering such applications, the court is actually invited to consider whether, on the face of the pleadings, the contents of which are assumed to be true, the court is prepared to say that the plaintiffs' claim or cause of action is obviously unsustainable. If the answer is in the affirmative, the court must strike out the claim. In *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285, the Court of Appeal, citing Diplock LJ in *Letang v. Cooper* [1965] 1 QB 222 explained that the expression "reasonable cause of action" means "… simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". Otherwise, the claim, however weak, must be allowed to proceed.

[23] The defendants say that the pleaded case yields no reasonable cause of action by reason of illegality; illegality which is specifically pleaded by the plaintiffs themselves. The illegality arises from the investment schemes which are really "skim cepat kaya", prohibited by the Government of

Malaysia as seen from the service circular known as "Pekeliling Perkhidmatan Bilangan 2 Tahun 2009: Larangan Penglibatan Pegawai Awam Dalam 'Skim Cepat Kaya'" issued specifically for that purpose:

> Skim Cepat Kaya bermaksud satu bentuk pelaburan yang menawarkan kadar pulangan yang tinggi atau tidak realistik bagi jumlah pelaburan yang kecil dan bebas daripada sebarang risiko, yang tidak berdaftar dengan Bank Negara Malaysia, Suruhanjaya Sekuriti, Suruhanjaya Koperasi Malaysia, Kementerian Perdagangan Dalam Negeri dan Hal Ehwal Pengguna atau pihak-pihak berkuasa lain. Ia juga termasuk sebarang bentuk pelan/aktiviti pelaburan yang menyalahi undang-undang walaupun ianya dijalankan oleh institusi berdaftar dengan pihak berkuasa yang berkenaan.

[24] Learned counsel for the defendants submitted that the plaintiffs' claim is either a case of enforcing the illegal schemes and agreements; or one where the plaintiffs are trying to get out of the consequences of entering into or being part of such schemes. In both cases, the court will not lend its aid.

[25] The plaintiffs have submitted otherwise; pointing out that its reliefs are of the nature described at para. 68 of its statement of claim. The plaintiffs are not seeking restitutionary remedies or recovery of monies contractually promised to them under the agreements. Neither are they looking to enforce the agreements. The agreements, training materials and other documents are said to be only "tools" to commit fraud, deceit and misappropriation of the plaintiffs and other claimants' monies. It would be inappropriate, if not, wrong for the court to embark on a series of submission that the plaintiffs are prevented from suing and bringing the defendants to court because the contracts are illegal and that the court must not enforce illegal contracts. The plaintiffs further submitted that it would be erroneous for the court to ascertain the purpose of their payment of money at this interlocutory stage; that such a matter should be decided at trial, as found by the learned Judge.

[26] With respect, we find difficulty in accepting the plaintiffs' line of argument. Although learned counsel for the plaintiffs contend that the plaintiffs are not suing the defendants for restitution, that they are not seeking to enforce the agreements, or seeking decrees of specific performance; or seeking to recover monies promised to them under the agreements, the plaintiffs are nevertheless seeking the assistance of the court on an action that is rooted in illegality. The law is trite in that the court cannot grant any relief on a claim which is founded on illegality, let alone enforce any rights based on such illegality. See the latest Federal Court's decision in *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619.

[27] The proper consideration of the matter of illegality which is central in these appeals must start with the plaintiffs' claim, as pleaded. We have already set out in the earlier parts of this judgment, what forms the factual

and legal bases for the plaintiffs' complaints and causes of action. The long and short of the plaintiffs' claim is that the plaintiffs seek to recover their investments of RM34,449,844.24 which they have paid under the schemes and under their agreements. These schemes, arranged under the agreements which the plaintiffs have signed with the defendants, are pleaded by the plaintiffs themselves to be, invalid and unenforceable. The plaintiffs have explained, quite firmly and in no uncertain terms, the reasons for that assertion.

[28] At para. 65 of the statement of claim, the plaintiffs plead that the defendants' businesses and business models are illegal because at least two pieces of legislation which are identified by the plaintiffs themselves, namely the Financial Services Act 2013 and the Direct Selling Act 1993, have been contravened. Although the plaintiffs have sought to distance themselves from their pleas, submitting that the plaintiffs are not in court to seek enforcement of the agreements, or to seek a decree of specific performance of the agreements, or even less, to seek recovery of the sums contractually promised to the plaintiffs under the agreements; that the plaintiffs are in court to seek the reliefs pleaded at para. 68 of the statement of claim, we are not convinced. A closer look at the loss and damages pleaded at paras. 67 and 68 reveal that the plaintiffs are seeking to recover their investments due to the illegal agreements. These remedies are restitutionary in nature, the plaintiffs are seeking to be restored to their pre-contractual positions.

[29] Consequently, any which way one looks, the statement of claim is clear and explicit, it complains of the illegality of the schemes and the agreements; that these schemes and agreements contravene two specific laws; that is, the Financial Services Act 2013 and the Direct Selling Act 1993. The two legislations prohibit the activities, schemes and agreements under complaint. Having made those complaints, it does not lie in the face of the plaintiffs to say that their claim is nevertheless sustainable because they are seeking some other remedy.

[30] With such explicit statutory prohibitions, the court has always declined intervention; this reluctance and refusal stems from the maxim *ex turpi causa non oritur actio*, as expounded by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp 341. In that judgment, Lord Mansfield said:

> No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides,

and the defendant was to bring an action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

[31] Two decisions from our courts come to mind when dealing with the illegality principle. First, the decision in *Soh Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91 where the High Court dismissed the plaintiff's claim which was founded on a 'friendly loan'. As it turned out, the loan transaction contravened the Moneylender's Ordinance. On that score, Wan Yahya J (as he then was) dismissed the claim finding that the plaintiff could not sue upon the illegal contract; and neither could he seek restitution of his money under s. 66 of the Contracts Act 1950.

[32] Next, is the Federal Court's decision in *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 where the Federal Court has expressed in clear and firm terms that the courts will not assist parties to an illegal contract. At paras. 223-224 (CLJ); paras. 16 and 19 (MLJ), the Federal Court held:

[16] Section 24 of the Act stipulates five circumstances in which the consideration or object is unlawful, namely, where (a) it is forbidden by a law; (b) it is of such a nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral, or opposed to public policy. 'In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void … The provision of s. 24 of our Contracts Act 1950 referred to earlier are explicit statutory injunctions. The statute provides expressly that the considerations or objects referred to in paras (a), (b) and (e) of s. 24 shall be unlawful and the agreement which ensues shall be unlawful and void. Paragraph (a) deals with what is forbidden or prohibited by law; para (b) deals with what could defeat the object of any law; and para (e) deals with public policy' (*Chung Khiaw Bank Ltd v. Hotel Raya Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 per Hashim Yeop Sani CJ (Malaya), delivering the judgment of the court), which statements 'continue to be good law' (*Fusing Construction Sdn Bhd* v. *EON Finance Bhd & Ors* [2003] 3 MLJ 95, at p. 105 per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court). '… consideration is unlawful if it is forbidden by law, or is of such a nature that, if permitted, would defeat the provisions of any law or is immoral or opposed to public policy. Unlawful consideration is a defence against the plaintiff. Consideration opposed to public policy is illegal, and contracts founded on them are condemned by law. An agreement to be a variance with public interest it is said, must be clearly and indubitably in contravention of public policy (*Chong Kow v. Kesavan Govindasamy* [2009] 8 MLJ 41, Mohd Ghazali J, as he then was).

…

[19] It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common law or statute, no court will lend its assistance to give

A effect (*Cope v. Rowlands* [1836] 2 M&W 149, at p 157 per Parke B, which was quoted with approval in *Tan Chee Hoe & Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 MLJ 301 per Ramly Ali FCJ, delivering the judgment of the court). 'Under s. 2(g) of the Contracts Act 1950, an unlawful agreement is not enforceable' (*Lori (M) Bhd Interim Receiver) v. Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 per Edgar Joseph Jr FCJ, delivering the judgment B of the court). [emphasis added]

[33] Two decisions from the Court of Appeal have since followed and applied *Merong Mahawangsa Sdn Bhd & Anor v. Dato Shazryl Eskay Abdullah*, in the cases of *Setiausaha Kerajaan Negeri Selangor v. Perbadanan Riadah Sdn Bhd And Another Appeal* [2016] 1 LNS 1497; (Court of Appeal Civil Appeal C No: B-01-343-09-2014); and *Foo Jong Wee & Ors v. Hj Afifi Hj Hassan* [2016] 6 CLJ 696 (Court of Appeal Civil Appeal No: W-02-696-03-2013).

[34] We appreciate that there is some debate in the UK on the proper approach when dealing with the issue of illegality. This is reflected in the D decision of the Supreme Court of the United Kingdom in the case of *Patel v. Mirza* [2016] UKSC 42. Although the appeal was unanimously dismissed, the Law Lords differed on the approach. The main judgment was written by Lord Toulson which was agreed to by Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge while Lord Neuberger, Lord Clarke, Lord Mance and Lord Sumption wrote separate judgments expressing their views which differ from E Lord Toulson's. Be that as it may, and for the purpose of the present appeals, Lord Mance's following remarks show a consistent universal abhorrence of the court to claims which are founded on illegality; that it is for reasons of public interest that the courts show their disdain for such claims. Lord Mance opined:

F

> [188] The basic problem, identified clearly and succinctly by Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp 341, is that there are at least three potential interests when questions of illegality arise for consideration: those of two parties and the public interest. **It is, as he said, for reasons of public interest that an otherwise good cause of action may** G **sometimes fail, where there has been illegality**. In the absence of any relevant statutory power, the court has no direct power to mediate between these three interests, by for example requiring the public interest to be satisfied by a payment to the public purse. It does not even have the power, conferred by statute in New Zealand, to vary or validate an illegal contract in part "or otherwise howsoever" (New Zealand Illegal H Contracts Act 1970, s. 7). (emphasis added)

[35] We are also aware that the plaintiffs have sought to distinguish their claim on the basis of the kind of reliefs sought, that for that principal reason, the case should go to trial. Relying on the same decision of *Patel (Respondent) v. Mirza (Appellant)*, the plaintiffs say that this is not a plain and obvious case I to be struck out.

[36] With respect, we disagree. In *Patel v. Mirza*, Lord Sumption had advocated the reliance test as most appropriate in determining whether the illegality principle applies in any given factual presentation. The reliance test requires the claimant to ask whether he is obliged to rely on his part of the illegal act in support of his claim. Lord Sumption was of the view that this was "… implicit in Lord Mansfield's statement of principle, which assumes that the plaintiff's action is "founded on" his illegal act…The test may be applied in different ways, depending on what it is that the law regards as illegal." At para. 239, Lord Sumption reasoned as follows:

> 239. Shorn of the arbitrary refinements introduced by the equitable presumptions which in any event apply only in property cases, the reliance test accords with principle. *First, it gives effect to the basic principle that a person may not derive a legal right from his own illegal act. Second, it establishes a direct causal link between the illegality and the claim, distinguishing between those illegal acts which are collateral or matters of background only, and those from which the legal rights asserted can be said to result. Third, it ensures that the illegality principle applies no more widely than is necessary to give effect to its purpose of preventing legal rights from being derived from illegal acts. The reliance test is the narrowest test of connection available*. Every alternative test which has been proposed would widen the application of the defence as well as render its application more uncertain. (emphasis added)

[37] Lord Sumption had in fact made the argument along the same lines when he was counsel in *Stone & Rolls Ltd (in liquidation) v. Moore Stephens (a Firm)* [2009] UKHL 39, a case which was successfully struck out by the defendant, on the illegality principle.

[38] In our present appeal, the two pieces of legislation relied on by the plaintiffs themselves expressly prohibit the activities and agreements which form the basic substratum of the claim. The plaintiffs clearly rely and need to rely on these illegalities to found their action; but for these illegalities, there would have been no complaints to begin with. According to the plaintiffs' pleaded case, everything proceeded as agreed under the respective appointment agreements from 2009 to 2013, the plaintiffs marketed and promoted the schemes and modules to third parties aside from the plaintiffs themselves investing in the same. Up to 2013, the plaintiffs received commissions and returns from these illegal schemes, arrangements and agreements.

[39] In 2013, the payments of commissions stopped. It is at this point that the plaintiffs see fit to complain. Quite clearly, the plaintiffs rely on their own participations in these schemes in order to make their claim and seek relief. The plaintiffs are *in pari delicto* in these illegal schemes. The plaintiffs, who, on their own admissions, are so circumstanced, cannot now turn to the court and find redress from their own acts or participation in the illegality; it would be against public interest to permit such recourse. Such a claim is

A therefore obviously unsustainable in law and will not succeed; and it would be futile to allow the claim to proceed any further, wasting precious resources and time of all involved; not to mention, giving the plaintiffs a false and misleading picture.

B **[40]** The learned judge has, unfortunately, not given any reasons or expressed any views on these matters. Instead, the judgment focuses on the tenth defendant's application and there do not appear to be any deliberations on these defendants' application save to say at para. 14, that since the court had earlier granted the *Mareva* order, there are therefore issues to be tried between all the defendants and the plaintiffs; consequently, the application C must be dismissed.

[41] With respect, the issue and ground of illegality which is raised by these defendants are serious, important and require addressing. The learned judge appears to have treated the plea of illegality in the factual circumstances as sufficient to warrant trial. We cannot agree with such a proposition and D it would be dangerous precedent to suggest that to be the case. It is a matter of judicial consideration according to the applicable principles which was obviously not exercised here, and not exercised judiciously. This is ground alone for appellate intervention by this court.

E **[42]** This is quite apart from the fact that an application to strike out pleadings relies on different principles from those engaged in an application for an interim injunction, even more so where the application is for a *Mareva* injunction. Just because an injunction is allowed does not mean that the application to strike out must necessarily fail. The failure of the learned judge to consider and deliberate according to the applicable principles is again F reason enough to invite the intervention of this court as was explained in *Flannery and Another v. Halifax Estate Agencies Ltd* [2000] 1 All ER 373.

[43] In any case, even if one were to examine the grounds of decision on the *Mareva* injunction, that the defendants had raised and pivoted the illegality issue in opposition to the application, the issue then, was also not addressed G or properly addressed or even determined by the learned Judge in that application. All that the learned judge has done was to set out the respective parties' positions on the plaintiffs' application for the *Mareva* injunction (see paras. 20 to 25 of the learned judge's decision in relation to the application for *Mareva* injunction), before finding at para. 29 of the related grounds that H the plaintiffs' claim is founded on the tort of deceit, fraud, conspiracy to defraud the plaintiffs, misappropriation of the plaintiffs' monies, and against the tenth defendant, the tort of unlawful or dishonest receipt and assistance. At para. 30, the learned judge concluded that there were thus grounds for the injunction and proceeded to make the order.

I **[44]** As we have shown above, the matter of illegality is an issue that required the learned judge to examine at the material time of the injunction application, whether it was one which patently and obviously undermined the claim such that there was in effect, no real question of any regard or

degree to be tried. In the balancing of interests, the conduct of the plaintiffs who were parties to the illegality should have been examined, in order to consider where the justice of the case lies. The principles for the proper exercise of judicial discretion were also not adhered to in the particular facts and circumstances of this appeal.

[45] In the present appeals, the plaintiffs had themselves pleaded the illegality and their roles in that illegality. The illegalities complained of in this appeal are not questioned. On the contrary, the illegalities are admitted and relied on by the plaintiffs. Under these conditions, it is clear that the plaintiffs' claim is plainly and obviously unsustainable and must be struck out under O. 18 r. 19(1)(a) of the Rules of Court 2012. It was quite clearly erroneous of the learned judge to have considered that the issue of illegality requires any trial.

Conclusion

[46] For all the above reasons, the appeal on the application to strike out the plaintiffs' claim must be allowed. The order of the learned judge is set aside and the plaintiffs' claim against these defendants must stand struck out.

[47] In view of our decision above, we find that the order of a *Mareva* injunction made on 2 May 2016 must also fall. We are aware that this decision was made earlier than the above order in respect of the striking out. However, in view of our decision allowing the defendants' application to strike out the plaintiffs' claim, the order dated 2 May 2016 is no longer maintainable.

[48] For avoidance of doubt, we express the view that the learned judge is in any event, erroneous, both on the law and on the facts to have granted the order. The defendants had raised the matter of illegality; and it was paramount that the learned judge deliberate the issue instead of allowing it to be a reason why the claim should go to trial under the "plain and obvious" test laid down in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. In *S&F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280; [1985] 1 MLJ 62, the Federal Court had opined that while it is the High Court that has discretion on whether or not to grant an interlocutory injunction, in reviewing that decision on appeal, the Court of Appeal is entitled to overrule that decision where the exercise of discretion has been erroneous on the law or misconceived on the facts. We have found that to be so here; the learned judge's exercise of discretion was clearly erroneous. It was incumbent on the learned judge to deliberate on the issue of a pleaded and admitted illegality as raised by the defendants instead of sweeping it under the broad expression of "a good arguable case" for trial.

[49] For all reasons adumbrated above, we find merits in both appeals. In respect of the first appeal, Civil Appeal No: T-02(NCVC)-1053-06-2016, the appeal is allowed with costs of RM10,000 subject to the payment of allocator; and the grant of a *Mareva* order on 2 May 2016 is further set aside. In respect of the second appeal, Civil Appeal No.:T-02(NCVC)-1053-06-2016, we find that the plaintiffs' case is plainly and obviously one which is unsustainable by reason of illegality. This second appeal is therefore allowed with costs of RM10,000 subject to the payment of allocator. The claim is consequently struck out under O. 18 r. 19(1)(a) of the Rules of Court 2012 against the defendants before us. The decision of the High Court made on 21 July 2016 for this second appeal is also set aside.